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Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

GREGORY D. BOLIN,

Petitioner,

v.

E.K. MCDANIEL, WARDEN OF ELY STATE PRISON

THE STATE OF NEVADA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

The question presented in this case is:

Whether in a circumstantial murder case, an erroneous instruction permitting the jury to consider a prior unrelated offense as evidence of "propensity" can be harmless or whether, instead, such an error "vitiates *all* of the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gregory Bolin respectfully petitions for a writ of certiorari to review the judgment of the Nevada Supreme Court in this case.

OPINIONS BELOW

The Clark County District Court's denial of Mr. Bolin's state court petition for postconviction relief below is unpublished. A copy is reproduced in the Appendix. The Nevada Supreme Court's decision affirming the district court is also unpublished. A copy is reproduced in the Appendix.

JURISDICTION

Mr. Bolin invokes the jurisdiction of this Court under 28 U.S.C. § 1257. The judgment of the Nevada Supreme Court sought to be reviewed was entered on June 22, 2007. On September 11, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 19, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)(1) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

In this capital murder case, the jury was presented with detailed and graphic testimony from the victim of a wholly unrelated sexual assault to which the defendant had pled guilty twenty years earlier. The prosecution urged, and the trial court invited, the jury to consider this evidence to determine whether the defendant had an "emotional propensity for sexual aberration" that might bear on the current charge—for murder, in a case where the evidence of sexual assault was minimal at best.

In subsequent cases, the Nevada Supreme Court held that the trial court's instruction in Mr. Bolin's case was erroneous. The Court first explained that using prior offenses to show "propensity" was forbidden because it not only permits, but invites the jury to convict because it "believes the defendant to be a bad person." *Braunstein v. State*, 40 P.3d 413, 417 (Nev. 2002). The Court then overruled its prior approval of the instruction at issue. *Richmond v. State*, 59 P.3d 1249, 1256 (Nev. 2002)

The trial court's invitation to the jury to consider the prior bad act evidence as establishing a "propensity" to commit such offenses—and thus to view every inference in this entirely circumstantial case through that lens—rendered the trial fundamentally unfair in violation of the Due Process Clause. That fundamental unfairness was not and could not be deemed "harmless." Any such after-the-fact assessment of the evidence substitutes unbridled speculation for a jury verdict beyond reasonable doubt.

A. The Circumstantial Case Against Mr. Bolin

The State's case against Mr. Bolin was entirely circumstantial. The victim, Brooklyn Ricks, was found stabbed to death at a construction site. She was found fully clothed; the evidence that the murder was part of a sexual assault was that her underwear was on inside out. Record on Appeal ("ROA") 29:60. There were no cuts or bruises characteristic of sexual assault. There were no eyewitnesses to the crime. There was no fingerprint evidence linking Mr. Bolin to the scene, no blood evidence, no semen. The prosecution built its case around the undisputed facts that Mr. Bolin's mother had an account at the video store where the victim worked and that Mr. Bolin had visited the store on the night she died.

The construction worker who found Ms. Ricks body told police that he had briefly seen an African-American man walking away from the construction site where he found the body. ROA 22:36-37, 40-46. When first interviewed by investigators, the witness stated that, from inside his truck and at a distance of at least 20 feet, he had seen the man only from the right side and did not directly observe the man's face. ROA 6:26, 31; 23:28-31.

The following day, the witness was asked to come to the station and was told that, because he was the only person who had seen the suspect at the crime scene, the "awesome responsibility" for identifying the suspect "solely rests with you." ROA 25:12-13, 24:30. At the station, even after a highly suggestive one-on-one "show up" procedure,[1] the witness was

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[1] The police positioned the witness where he could see Mr. Bolin being escorted through to the "booking area" by a uniformed police officer. ROA 22:65; 26:95. Then, in the witness's line of

unable to identify Mr. Bolin as the man he had seen. The witness stated that, on a scale of 1 to 10, he would gauge the likelihood that Mr. Bolin was the person he had seen at the construction site as a "5." ROA 27:29; 40:21.

An hour later, the witness called the police, seeking assurance that Mr. Bolin was the person *the police believed* the witness had seen leaving the crime scene. ROA 22:71; 40:26. After this conversation, the witness stated that he was 70-80% sure that Mr. Bolin was the man he had seen the day before, from the side, from inside his car, at a distance of twenty feet. ROA 24:46; 27:137. That testimony reached its final evolution at trial, when the witness claimed, for the first time, that he could identify the defendant because "I recognize his face." ROA 25:47

The State also relied on two pubic hairs found on the victim. One hair was sent for DNA testing.[2] The State's own expert conceded that the results showed that, at some unknown point, the hair sample had been contaminated.[3] Because of that contamination,

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vision, Mr. Bolin was questioned by the same detective who had interviewed the witness at the scene, ROA 26:95-96, then photographed by the police photographer—who had also been at the scene, ROA 1:144; 6:117; 6:69; 24:43—and asked to disrobe, ROA 24:42; 25:60. Only then was the witness asked whether Mr. Bolin was the man he had seen.

[2] Although at least two potentially foreign hairs were found on the victim's body, one of which the State conceded was not Mr. Bolin's, the State's expert analyzed only the one, darker hair. ROA 31:169. This second pubic hair found on the victim was also circumstantial evidence of sexual contact and of a potential perpetrator *other than Mr. Bolin*, yet it was not subjected to any testing or analysis.

[3] The State's DNA expert testified that DNA material should be

the expert conceded that "no conclusion can be made regarding the donor of the hair"—i.e., there was no way to know whether the DNA came from the donor of the hair or from some other source before or after the crime. The DNA *might* have come from the perpetrator, some other person the victim was in contact with, or some other source during the investigation. In her testimony, the State's expert confirmed that she had "no way of knowing" whether the DNA came from the hair itself or from some other tissue attached to and contaminating the hair. ROA 31:179. The DNA analysis itself was not capable of *matching* DNA samples; the analysis merely narrowed the potential sources of DNA to several thousand people living in Las Vegas and an unknown number of visitors to the area.

With no basis for suggesting that the DNA came from the hair, the State nevertheless argued that a curly black pubic hair was probably "African-American," that the DNA came from this "African American" public hair, and that only 1 in 2600 African-Americans shared a particular genetic marker found in the DNA which was found on the (concededly contaminated) hair sample. ROA 31:212; *see also* ROA 49:33-34. The state's inability to determine whether the DNA came from the hair did not stop the prosecutor, who extrapolated that, based on the DNA and the African-American population of Las Vegas, only ten people in the city, one of whom was Mr. Bolin, could have committed the crime.[4]

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found only in the root of a hair, not the shaft, and that if tests extract DNA on the shaft of the hair, that means the hair sample has been contaminated. The hair found on the victim's body showed DNA on the shaft of the hair. ROA 31:179.

[4] Because each of the assumptions behind this statistical

Weak at best, the State's statistical evidence was entirely spurious, piling inference upon inference based on DNA evidence from which, as the State's expert's concluded, no inference could be drawn.

The State sought to buttress its weak circumstantial case with detailed and graphic evidence of a sexual assault more than twenty years earlier. Mr. Bolin had pleaded guilty in 1975 to kidnapping and sexual assault in Colorado. ROA 3:688. At trial in 1996, the State called the victims in the 1975 case, as well as the investigating officers, all of whom testified at length over the course of several days, setting out in graphic and riveting terms the unrelated details of a kidnapping and rape the defendant and an accomplice had committed twenty years earlier. ROA 27:69-86; 28:54-118; ROA 29:28-46; 29:5-27.

During the trial, the court repeatedly told the jury that it could consider this prior offense to assess whether Mr. Bolin had a "propensity" for "sexual aberration." ROA 27:86-87; 28:117-18. In its closing argument, the State emphasized this point, telling the jury that it could consider Mr. Bolin's "sexual aberrant behavior" in 1975 as bearing on the "sexual aberrant behavior seen in this case." ROA 51:168. The jury had seen no sexually aberrant behavior in the Nevada case, because no such behavior had been witnessed. The only thing the jury could make of this was that it was an entitlement to conclude that a defendant who once raped a woman at gun point was

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argument was unsustainable, the statistics, in fact, proved nothing. But even applying the State's flawed presumptions, there were at least 137 people in the City of Las Vegas (not even considering the large transient population) with the same genetic marker found in the DNA from the contaminated hair.

more likely to have committed a wholly unrelated stabbing (and possible sexual assault).

In its final instructions to the jury, the Court again told the jury that the evidence of the prior offense could be considered to show whether Mr. Bolin had an "emotional propensity for sexual aberration." ROA 51:94.[5] The court rejected Mr. Bolin's proposed instruction that would have limited the jury's consideration of the evidence to one of the recognized, non-propensity purposes typically allowed for evidence of other bad acts.[6]

The jury convicted Mr. Bolin on all counts. Mr. Bolin was sentenced to death.

On direct appeal, the State argued that the earlier offense was admissible to establish "identity." But Mr. Bolin's previous offense, committed in 1975, and the murder of Brooklyn Ricks, committed in 1995, revealed no signature or identity beyond the most abstract similarities: The victims were white, young women of average height and weight. (The Court also stated, incorrectly, that the victims were both blond. In fact, the victim of the 1975 offense testified

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[5] The jury instruction was as follows: "Evidence of a person's character or a trait of his character or evidence of other crimes, wrongs or acts, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. However, such evidence is admissible for other purposes, such as proof of motive, intent, knowledge, or identity, and as *evidence that the person possesses a specific emotional propensity for sexual aberration*."

[6] Mr. Bolin's proposed instruction was as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may be admissible for other purposes such as proof of motive, intent, plan, or identity."

that she was a brunette. ROA 8:8.)[7] Justice Rose noted the absence of significant similarities that might establish a signature or fingerprint:

> And in this case I don't see much of that fingerprint. I see there was no murder [in Colorado], it was done with another [co-assailant], this is the Colorado matter. There was robbery [in the Colorado matter], robbery was clearly one of the major ingredients there and it appears to be marginal here. It was done with a gun in Colorado and a knife here. There were two victims in Colorado and not here. And the sexual assault [in the Nevada case] is questionable. So I don't see an awful lot of the identifying marks you're talking about and if I don't see a lot, I really wonder whether or not the District Court was right.[8]

The Court nevertheless affirmed, *Bolin v. State*, 960 P.2d 784 (Nev. 1998), holding that the twenty-

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[7] *Bolin v. State*, 960 P.2d 784, 796 (Nev. 1998) ("[the Colorado victim] was a twenty-year-old slender white female with blond hair who was 5'5" tall. Similarly, at the time of her abduction and murder, Ricks was a twenty-one-year-old slender white female with blond hair who was 5'7" tall."). The State argued that the prior act showed "identity" not based on any distinct *modus operandum* or "signature" linking the two offenses, but on the theory the same "kind of person" committed each offense; that is, "identity" is established by showing that the perpetrator in both cases had the same *propensity*.

[8] *See also Weber v. State*, 119 P.3d 107, 131 (2005) (Rose, J., concurring)(citing Mr. Bolin's direct appeal for the proposition that district courts admit prior bad act evidence too often, even if the act is remote in time).

year-old offense was properly admitted to prove identity. *Id.* at 796 n.5. As to the instruction to the jury that it could consider the evidence for the purposes of establishing a "propensity" for sexual aberration, the Court affirmed the instruction as an "accurate[] instruct[ion to] the jury on the law of this state." *Id.* at 800-01.

Mr. Bolin's petition for rehearing was denied on August 27, 1998. Certiorari was denied on March 1, 1999.

B. The Supreme Court of Nevada Recognizes That Mr. Bolin's Direct Appeal Was Erroneously Decided.

Four years after affirming Mr. Bolin's conviction and sentence, the Supreme Court of Nevada explicitly recognized that the instruction in Mr. Bolin's case—permitting the jury to consider the prior bad act evidence as establishing "propensity"—was erroneous.

In *Braunstein v. State*, 40 P.3d 413 (Nev. 2002), the Nevada Supreme Court expressly overruled the authorities on which it had relied to affirm Mr. Bolin's conviction. The Court held that "using uncharged acts to show criminal propensity is forbidden and is commonly viewed as grounds for reversal." *Id.* at 417. Such evidence, the Court explained, invites the jury to convict on the ground that it "believes the defendant to be a bad person." *Id.* Addressing its previous cases to the contrary, the Court "specifically overrule[d] the legal proposition . . . that evidence of other acts offered to prove a specific emotional propensity for sexual aberration is admissible and that, when offered, it outweighs prejudice." *Id.* at 418.

In *Richmond v. State*, 59 P.3d 1249 (Nev. 2002), the Nevada Supreme Court explicitly acknowledged that its decision in *Bolin* upholding the propensity instruction was erroneous:

> [T]he district court [in *Richmond*] instructed the jury that it could consider evidence of Richmond's prior bad acts to find he possessed a specific propensity for sexual aberration. This instruction derives directly from an instruction we upheld in *Bolin v. State*. Our decision in *Bolin* relied entirely on . . . the cases we overruled in *Braunstein*. Because we held in *Braunstein* that "evidence of other acts offered to prove a specific emotional propensity for sexual aberration is inadmissible," we direct the district courts to cease instructing juries that such evidence is admissible.

Richmond, 59 P.3d at 1256.

C. Mr. Bolin's State Petition For Postconviction Relief Is Denied on the Ground that the Instruction Was "Harmless."

Mr. Bolin's petition for state postconviction relief was timely filed on April 22, 1999 and argued before the trial court on September 29, 2004. Mr. Bolin argued, *inter alia*, that the admission of the evidence of the prior offense, coupled with the specific instructions to consider the evidence for "propensity" purposes, violated Nevada state law as established by *Braunstein* and *Richmond* and the due process and jury trial rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. *See Garceau v. Woodford*, 275 F.3d 769 (2001), *rev'd on other grounds by Woodford v.*

Garceau, 538 U.S. 202 (2003); *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

The State conceded that, under *Braunstein* and *Richmond*, the admission of the prior bad acts evidence to show a propensity for sexual aberration and the corresponding jury instruction had been in error. The trial court denied the petition, holding that Mr. Bolin was not entitled to the benefit of the Nevada Supreme Court's subsequent recognition of its error in his case. The Nevada Supreme Court affirmed on different grounds, holding that although "*Richmond* would have rendered the sexual aberration jury instruction improper . . . the error in giving the instruction would have been *harmless* in light of the *weight of the evidence* supporting Bolin's conviction." Appendix, 3a.(emphasis added).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to correct a fundamental error routinely committed by the highest state courts and the federal courts of appeal. Every federal court of appeal to consider the issue has held that the consideration of prior bad acts evidence as propensity evidence violates due process. *See Alberni v. McDaniel*, 458 F.3d 860, 865-66 (9th Cir. 2006) (collecting cases). But, just as uniformly, the federal courts of appeal[9] and state appellate

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[9] *See e.g., Lacy v. Gardino*, 791 F.2d 980, 987 (1st Cir. 1986) (jury exposure to extra-record evidence of the defendant's prior bad acts, although admittedly a constitutional violation, was subject to a harmless error analysis on federal habeas review); *Dunnigan v. Keane*, 137 F.3d 117, 127 (2d Cir. 1998) (admission of evidence of past crimes without a limiting instruction subject to harmless error analysis on federal habeas review); *Albrecht v. Horn*, 485 F.3d 103, 127-29 (3rd Cir. 2007) (admission of prior crimes evidence without a limiting instruction combined with

courts[10] have subjected constitutional errors based on prior bad act evidence to a harmless error analysis. Harmless error review of the express invitation to base a conviction on propensity evidence has never been approved of by this Court and is contrary to this Court's precedents in *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993) and *Neder v. United States*, 527 U.S. 1, 11-13 (1999). Without this Court's guidance,

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explicit statements by the prosecutor to draw conclusions about the defendant's bad character and propensity to commit the current crime was subject to harmless error analysis); *Dorsey v. Quarterman*, 494 F.3d 527, 531-32 (5th Cir. 2007) (extrinsic evidence of prior crimes subject to harmless error analysis on federal habeas review); *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1998) (subjecting other bad act evidence admitted without limiting instruction to harmless error analysis); *Hobbs v. Lockhart*, 791 F.2d 125, 128 (8th Cir.1986) (subjecting other crimes evidence to a harmless error analysis on federal habeas review); *McKinney v. Rees*, 993 F.2d 1378, 1385-86 (9th Cir. 1993) (deciding whether erroneously admitted character evidence was harmless error on federal habeas review); *Duvall v. Reynolds*, 139 F.3d 768, 788 (10th Cir. 1998) (articulating the rule that the constitutionally erroneous admission of prior acts testimony was subject to a harmless error analysis on federal habeas review); *Dobbs v. Kemp*, 790 F.2d 1499, 1504 (11th Cir. 1986) (on federal habeas review, finding that admission of evidence of prior crimes did not render trial fundamentally unfair because even if the jury considered it improperly, it was harmless).

[10] *See, e.g., State v. Goodson*, 135 P.3d 1116, 1126-27 (Kan. 2006) (assuming admission of propensity evidence implicates due process and applying harmless error review); *State v. Griffin*, 753 N.E.2d 967, 978 (Ohio App. 2001) (same); *State v. Barcella*, 16 P.3d 288, 295-96 (Idaho App. 2000) (noting that "due process does not guarantee . . . an error-free trial" and applying harmless error analysis to admission of evidence of prior bad acts); *cf. State v. Wareham*, 772 P.2d 960, 963 (Utah 1989) (holding that admission of prior bad acts evidence was error under applicable statute but finding error harmless).

this error will be repeated and will continue to undermine the fairness of criminal trials throughout the country.

This Court should also grant the petition because the erroneous application of a harmless error standard to the improper use of propensity evidence is largely insulated from federal habeas corpus review. In cases controlled by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a federal court may not grant habeas relief unless a state court's adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Estelle v. McGuire*, 502 U.S. 62 (1991), this Court recognized but reserved the question of whether it would "violate the Due Process Clause [to] permit[] the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Id.* at 75 n.5. With that question and the appropriate standard of review left unanswered by this Court, petitioners are deprived of federal habeas review of this long recognized error and deprived of their rights to due process and a jury conviction beyond reasonable doubt. *See Alberni*, 458 F.3d at 865-66; *Bugh v. Mitchell*, 329 F.3d 496, 512-13 (6th Cir. 2003).[11]

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[11] Lower federal courts routinely deny habeas relief on this basis. *See, e.g., Paige v. Bradshaw*, No. 1:05-CV-2618, 2007 WL 1656242 (N.D. Ohio June 6, 2007), at *11-12 (denying habeas relief in case involving decades old allegations of uncharged misconduct because "the Supreme Court [in *Estelle*] left the issue open"); *Baker v. Lewis*, No. Civ. S-01-0804 LKK JFMP, 2007 WL 1040969 (E.D. Cal. Apr. 4, 2007), at *28 (denying petition for habeas relief on additional ground that "Supreme Court has not expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit

Mr. Bolin's case provides a vivid example of this error and the impact on the jury's findings. Here, the State sought to fill the holes in its wholly circumstantial case with graphic, explicit testimony from the victims of a wholly unrelated crime, committed more than twenty years earlier. Not only was the jury given no limiting instruction narrowing the use of such evidence to proper purposes, the jury was expressly told that it *could* consider the evidence for improper purposes, as proving that Mr. Bolin had an "emotional propensity" to commit sexual offenses and therefore was likely to have committed an unrelated assault and murder. In post-conviction proccedings, both the State and the Nevada Supreme Court conceded that the propensity instruction was erroneous.

But, without any analysis of the impact of the error—without any effort to identify supporting evidence free of taint—the Nevada Supreme Court baldly asserted that an improper propensity instruction was "harmless" in light of the "weight" of the (circumstantial) evidence. The conclusion is nothing but speculation and cannot be squared with this Court's decisions in *Sullivan* and *Neder*.

Yet, if AEDPA is deemed to apply to Mr. Bolin's case, the federal court will not be able to grant habeas relief under § 2254(d)(1) , because this Court has reserved judgment on this issue. This Court

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other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes"); *Casey v. Brown*, No. C:04-4749 RJH (Pr), 2007 WL 2209325 (N.D. Cal. July 30, 2007), at *10 ("Because . . . there is no clearly-established Supreme Court authority, habeas relief could not be granted even if the court were to hold that petitioner's due process rights were violated.")

should grant Mr. Bolin's petition to make the constitutional violation clear and to correct the erroneous application of harmless error review, in light of *Sullivan* and *Neder*.

I. THIS COURT SHOULD MAKE CLEAR THAT AN EXPLICIT INVITATION IN A CIRCUMSTANTIAL CASE TO CONSIDER PRIOR ACTS EVIDENCE AS EVIDENCE OF A "PROPENSITY" TO COMMIT THE CHARGED OFFENSE IS CONSTITUTIONAL ERROR THAT CANNOT BE HARMLESS.

A. The Lower Court's Treatment of Such an Error as Harmless Cannot Be Squared with This Court's Jurisprudence.

The right to be found guilty *of the crime charged* beyond a reasonable doubt is integral to our system of criminal justice, and encompassed in the 5th and 14th Amendments' guarantees of due process. *In re Winship*, 397 U.S. 358, 360-61 (1970). This Court has long recognized that constitutional errors that impinge on that right can not be deemed harmless, relying on both the due process guarantee and the Sixth Amendment right to a jury trial. *Sullivan*, 508 U.S. at 281-282. The error at issue here—an express invitation to consider prior bad acts evidence as evidence of a propensity to commit the charged crime—is an intrinsic error, which taints the entirety of the jury's deliberations and findings.

In *Sullivan*, this Court explained that a constitutionally defective reasonable doubt instruction cannot be harmless, because the error "vitiates *all* the jury's findings." *Id.* at 281 (emphasis in original). There are no untainted findings against

which the taint might be measured and found harmless. In such circumstances, a "reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done." *Id.* The effect of the error itself is "unquantifiable," and thus not subjected to harmless error analysis. *Id.* at 282.

Especially in a wholly circumstantial case, the use of "prior bad acts" evidence to establish "propensity" also undermines the entirety of the jury's findings of guilt. As this Court has recognized, propensity evidence tends to "weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 476 (1948). The express invitation to consider inflammatory prior bad act evidence as establishing a criminal propensity gives the jury explicit authorization to resolve doubts about the inferences to be drawn from circumstantial evidence, eroding the presumption of innocence and the requirement of a finding of guilt beyond reasonable doubt. *See also Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring in part and dissenting in part) ("Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged."). Like a defective reasonable doubt instruction, this is a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." *Sullivan*, 508 U.S. at 281 (internal quotations omitted).

As with an erroneous burden of proof instruction, the invitation to the jury to view the evidence in light of the defendant's supposed "propensity" pervades the trial as a whole, vitiating all the jury's findings concerning the defendant's state of mind and conduct.

Once a jury is presented with evidence of prior bad acts and invited to consider it as establishing a propensity, the jury can bring that propensity to bear in deciding the inferences from, and the weight, relevance, and credibility of, every bit of circumstantial evidence. Because the error affects *all* the evidence, an instruction authorizing the jury to view circumstantial evidence through the lens of "propensity" cannot be "quantitatively assessed in the context of other evidence." *Sullivan*, 508 U.S. at 281. A reviewing court can only "speculat[e]" as to what a jury might have decided absent the erroneous instruction. *Id.*[12]

Moreover, as *Sullivan* explains, the application of "harmless-error" review in such a case would violate the defendant's Sixth Amendment right to a trial by jury. *See Sullivan*, 508 U.S. at 281. Faced with a pervasive constitutional error, a reviewing court may not substitute its judgment for what it concludes a hypothetical jury would have done absent the error. As this Court has explained, when a reviewing court performs that analysis, "the wrong entity judge[s] the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986). The reviewing court's hypothetical verdict is substituted for a properly-instructed jury's actual

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[12] *See also* D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 326, n.140 (1989) (Empirical data show, "if the jury learns of uncharged misconduct by the defendant it will probably use a different . . . calculus of probabilities in determining guilt") (internal quotation omitted); James S. Liebman, *Proposed Evidence Rule 413 to 415 - Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 754-55 (1995) ("Propensity evidence often is credited by jurors with more weight than it deserves.").

verdict. The Sixth Amendment will not tolerate that substitution; an actual untainted jury must consider the evidence and render a verdict.

In *Neder v. United States*, this Court established the framework for determining whether a jury-instruction error is an ordinary trial error that can be deemed harmless. *Neder v. United States*, 527 U.S. 1, 11-13 (1999). *Neder* expressly upheld the logic of *Sullivan* as to pervasive errors, but explained that *Sullivan* does not control when the error relates only to the misinstruction or omission with regard to a single element of the offense. *Id.* In such a case, the evidence presented as a whole may be considered, and the harmlessness of the omitted element may be evaluated and quantified. *Id.*

Unlike the omission of an element, the impact of authorizing the jury to convict based on "propensity" in a circumstantial case is not limited to a single element of the offense. A propensity instruction infects the entire trial—the manner in which the jury views *all* the evidence—and yields "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282.

Mr. Bolin's case squarely presents this issue. Error is conceded: The jury was improperly instructed to consider the prior bad act as evidence of "propensity" to commit the crime charged. This error deprived Mr. Bolin of a fair trial on the State's circumstantial case. Assessing how the jury would have responded to the circumstantial evidence in the absence of such an error is an exercise in speculation. Because of the pervasive, unquantifiable effect the explicit instruction to consider bad acts evidence as evidence of propensity, the error was not and could not be harmless. *See id.*

B. In Announcing the Correct Standard of Review, This Court Should Confront a Question Left Open in *Estelle* and Hold that an Express Invitation to Consider Evidence for Propensity to Commit the Crime Charged Can Violate Due Process.

In *Estelle*, the jury had *not* been invited to consider the challenged evidence as propensity evidence. In a footnote, this Court declined to reach the question "whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Id.* at 75 n.5.

Throughout this Court's jurisprudence, this Court has sanctioned the admission of evidence of prior bad acts only where there are adequate safeguards in place to ensure that a defendant's constitutional rights are protected. In *Spencer v. Texas*, 385 U.S. 554 (1967), for example, this Court relied on limiting instructions to ensure that prior bad acts were not considered as propensity evidence thus compromising the presumption of innocence and the reasonable doubt standard. There, the Court addressed the constitutionality of a habitual offender statute that required the allegation of previous convictions for similar offenses in the indictment, and the introduction of evidence of the offenses at trial for sentencing purposes. *Id.* at 556 n.1. The Court found that the risk of prejudice was balanced by clear instructions to juries to consider the evidence only for the limited purpose—sentence enhancement—for which it was admissible: "[T]he jury trying the pending criminal charge was fully informed of [a defendant's] previous derelictions, but was also charged by the court that such matters were not to be

taken into account in assessing the defendant's guilt under the current indictment." *Id.* at 556; *see also id.* at 562 ("[T]he law of evidence . . . has evolved a set of rules designed to reconcile the possibility that this type of information will have some prejudicial effect with the admitted usefulness it has as a factor to be considered by the jury . . . ."); *see also Dowling v. United States*, 493 U.S. 342, 353 (1990) (emphasizing importance of limiting instructions in finding no constitutional error in admission of acquittal of prior crime).[13]

In *Estelle*, this Court analyzed the admission of evidence that a defendant had previously abused a child he was accused of murdering. *Id.* at 67. At trial, the court gave a limiting instruction that forbade the use of the evidence to show that the defendant "has a disposition to commit crimes." *Id.* at 67 n.1. Instead, the instruction continued, the evidence could only be considered for limited purposes. The court instructed the jury that it could determine whether "it may [be] logically concluded that if the Defendant committed other offenses, he also committed the crime charged." The Defendant argued that this instruction amounted to a propensity instruction. *Id.* at 71.

The Court disagreed, because the challenged language had been cabined by an appropriate limiting instruction: "While the instruction was not as clear as it might have been, we find that there is

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[13] In his concurring and dissenting opinion, Chief Justice Warren noted the power of prior bad act evidence, and the tendency to alter the presumption of innocence. *Id.* at 575 (Warren, C.J., concurring in part and dissenting in part); *see also id.* at 575 nn. 4-6 (surveying commentary and caselaw).

not a 'reasonable likelihood' that the jury would have concluded that this instruction, read in the context of other instructions, authorized the use of *propensity evidence* pure and simple." *Id.* at 74-75 (emphasis added). Because the instruction did not amount to a "propensity instruction," the Court held that "neither the introduction of the challenged evidence, nor the jury instruction as to its use, 'so infused the trial with unfairness as to deny due process of law.'" *Id.* at 75 (internal citations omitted).

Spencer and *Estelle* rely heavily on limiting instructions to ensure that prior bad acts are not considered merely for propensity. The failure to give a limiting instruction permits the prior bad acts to be considered for propensity and thus violates due process. *See Murray v. Superintendent, Kentucky State Penitentiary*, 651 F.2d 451, 453 (6th Cir. 1981) ("The logical converse of [*Spencer*] is that it is unfair and violative of due process if evidence of other crimes is admitted without a limiting instruction.") When there is no limiting instruction *and* the jury is expressly invited to consider the evidence for propensity to commit the crime charged, the violation of due process is severe.

In the years since *Estelle* reserved judgment on the issue, every federal court of appeals to consider the issue has recognized that the improper use of propensity evidence may compromise the fundamental fairness of a criminal trial. *See Alberni*, 458 F.3d at 865-66 (collecting cases and stating that "every circuit . . . has acknowledged, at least implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair."); *see also Dunnigan v. Keane*, 137 F.3d 117, 127 (2d Cir. 1998) (failure to give a limiting instruction could "constitute an error so

egregious as to amount to a denial of due process"); *Albrecht v. Horn*, 485 F.3d 103, 128-129 (3d Cir. 2007) (admission of propensity evidence without a limiting instruction could violate due process if sufficiently "inflammatory"); *McKinney*, 993 F.2d at 1385 (admission of irrelevant propensity evidence violated due process clause); *Duvall v. Reynolds*, 139 F.3d 768, 788 (10th Cir. 1998) (acknowledging that mistakenly admitted evidence of prior crimes or convictions can "imping[e] on fundamental fairness of the trial itself.")(internal quotations omitted).

Where such evidence is admitted, the federal courts of appeal have required careful limiting instructions to prevent the use of such evidence for propensity. *See e.g. Albrecht*, 485 F.3d at 128 ("[I]t [is] extremely important that the jury understand the limited purpose in every case of such evidence.")(internal quotations and citations omitted).[14] Where such

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[14] Federal Rules of Evidence 413 and 414, which purport to allow the admission of evidence of prior sexual offenses in any sex offense case, were consistently and vigorously opposed by the Judicial Conference and Advisory Committee. *See* Judicial Conference's Statement to Congress Regarding Proposed Rules 413, 414 (noting the strong opposition by the "overwhelming majority of judges, lawyers, law professors, and legal organizations" who commented on the Proposed Rule, and that the Advisory Committee on Evidence recommended against the adoption of the rules with only one dissenting vote from the Department of Justice.) The lower courts have tried to limit the impact of Rules 413 and 414 by balancing of the prejudicial and probative value of such evidence under rule 403. *See e.g. United States v. Lemay*, 260 F.3d 1018, 1027 (9th Cir. 2001) ("We . . . conclude that as long as the protections of Rule 403 remain in place so that district judges retain the authority to exclude potentially devastating evidence, Rule 414 is constitutional."). The impact and constitutionality of Rules 413 and 414 remain unresolved.

safeguards are absent, the courts of appeal have consistently held that constitutional error results. *See id.; Garceau*, 275 F.3d at 776; *Murray*, 651 F.2d at 453.

This Court should make clear for all purposes what the courts of appeal have resolved. For without clarification from this Court, state courts remain free to misapply federal Due Process requirements immune from federal habeas review. Under AEDPA, federal courts may grant relief only if the state court adjudication violates "clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Because this Court has expressly left the question open, the lower courts have held that federal courts are precluded from affording relief for this error in cases controlled by AEDPA. *See Alberni*, 458 F.3d at 867; *Paige*, 2007 WL 1656242 at *11-12.

This result is not what Congress intended in enacting the "clearly established federal law" requirement. Congress meant to curtail the imposition on the states of disputed and unsettled federal constitutional rights.

Mr. Bolin's case is an appropriate vehicle for resolving the issue. This case presents precisely the scenario that this Court identified as a potential problem in *Estelle*, but declined to address: whether an express invitation to consider propensity evidence as such violates due process. In Mr. Bolin's case, the safeguards on which the Court relied in *Estelle* and *Spencer* are entirely absent. Instead, the jury was given an express invitation to consider the evidence as establishing propensity. This Court should grant review in Mr. Bolin's case both to settle the standard of review for such an error and, with the intervening

experience of the lower federal courts, to make clear what *Estelle* left open: that such an instruction violates the defendant's right to due process.

II. WHILE THE LOWER COURTS CONSISTENTLY APPLY THE HARMLESS ERROR STANDARD TO PRIOR BAD ACT ERRORS, THEIR ANALYSES OFTEN UNDERSCORE THE STRUCTURAL NATURE OF THE ERROR.

As noted above, the courts of appeal have forbidden evidence of other bad acts except pursuant to limiting instructions. Where, however, such safeguards are absent, and the jury was permitted to view such evidence as establishing a propensity to commit the crime charged, the courts consistently purport to weigh the evidence to determine whether the error was harmless. *See McKinney*, 993 F.3d at 1385-86 (finding pervasive propensity error but weighing evidence to assess the error's effect); *Garceau*, 275 F.3d at 777 (same); *Albrecht*, 485 F.3d at 129 (same); *see also* n. 9, *supra* (collecting cases applying harmless error analysis to propensity errors). Review of those cases shows that harmless error review is inappropriate in a circumstantial case; such an error is pervasive and cannot be harmless under *Sullivan* and *Neder*.

For example, in *McKinney*, the Ninth Circuit first "address[ed] the question left unanswered in *Estelle:* When does the use of character evidence to show propensity constitute a violation of the Due Process Clause?" 993 F.2d at 1384. The Court held that it violated the Due Process clause to admit evidence of other bad acts that supported no permissible inferences, such as motive, intent, or identity. The court then assessed the error under a harmless-error

standard. The court of appeal's own analysis shows that the harmlessness inquiry is misplaced.

The defendant in *McKinney* was accused of murdering his mother, who had died from knife wounds. At trial, the State introduced considerable evidence that the defendant possessed, collected, and was, in fact, "fascinat[ed] with knives," and he had once carved the words, "Death is His" into his closet door with a knife. 993 F.2d at 1382-83.

The court held that the failure to provide a limiting instruction for such evidence permitted it to be used as "character evidence" and was thus "contrary to firmly established principles of Anglo-American jurisprudence." *Id.* at 1380; *see also id.* at 1381 and n.2 ("The rule against using character evidence to show behavior in conformance therewith, or propensity . . . has persisted since at least 1684 to the present . . . ."). The purpose of the rule against character evidence was

> to force the jury, as much as humanly possible, to put aside emotions and prejudices raised by phrases such as "fascination with knives" and "Death is His," and consider the body of evidence, both testimonial and physical, before them, in order to decide if the prosecution has convinced them, beyond a reasonable doubt, that the defendant is guilty of the crime charged.

Id. at 1384.

The "emotionally charged" other acts evidence in *McKinney*, the court concluded, served to show propensity: "[M]uch of the disputed evidence was 'other acts' evidence probative only of character. *Id.* That evidence was "pervasive[] . . . throughout the

trial." *McKinney*, 993 F.2d at 1386. Over 60 pages of testimony was devoted to "McKinney's knife ownership and camouflage pants." *Id.* Essentially, "[t]he jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body." *Id.*

By contrast, the "case against [the defendant] based on relevant evidence was solely circumstantial." *Id.* The trial was therefore "impermissibly tainted" by the propensity evidence, because it allowed the jury to "skip[] careful analysis of the logical inferences raised by the circumstantial evidence and convict[] McKinney on the basis of his suspicious character and previous acts . . . ." *Id.* at 1385.

This assessment of the impact of propensity evidence is exactly right, but it renders harmless error analysis inappropriate. Where the jury's consideration of all the inferences in a circumstantial case are tainted by propensity evidence, the error has "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282. In such a case, the error "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281. The attempt in such a case to "weigh" the evidence – where the inferences drawn by the jury from that evidence were tainted by error – results in a determination of guilt by the wrong fact finder.

III. THE NEVADA SUPREME COURT'S ANALYSIS CREATES A CONFLICT WITH THE FEDERAL CASES.

The error in Mr. Bolin's case could not be harmless and cannot be considered "harmless" under any standard, including that employed by *McKinney* and

the other cases to consider the improper use of "other bad acts" evidence. As in *McKinney*, the propensity evidence – the direct testimony of a rape victim and her companion – was "emotionally charged." *See McKinney*, 993 F.2d at 1385; *c.f.*, *Spencer*, 385 U.S. at 562 (evidence of prior convictions was "almost always[] of a documentary kind," and there was "no claim that its presentation was in any way inflammatory"). The victims testified in graphic detail about the previous offense and its long-term aftermath. As in *McKinney*, the case against Mr. Bolin was wholly circumstantial, requiring the jury to draw inferences from a variety of wholly indirect facts.

Worse, not only was no limiting instruction given, but the jury was given an unambiguous, erroneous propensity instruction. *Garceau v. Woodford*, 275 F.3d 769, 776 (2001), (when potential propensity evidence is introduced, "[t]he only way to mitigate this harm, short of excluding the evidence altogether . . . is to give the jury a limiting instruction. Even worse than failing to give such an instruction is what the trial court did in this case: affirmatively inviting the jury to draw the propensity inference"), *rev'd on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003).[15] It is not possible to say, in such a case, that

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[15] *Garceau* was presented to the Court of Appeals pursuant to a petition for habeas corpus under 28 U.S.C. § 2254, prior to the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). The court of appeals held that the AEDPA was not applicable because the petition was already pending when AEDPA was enacted. The Supreme Court reversed and remanded on this point. *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). The petitioner, however, died before the case was reconsidered. *Garceau v. Woodford*, 399 F.3d 1101, 1101 (9th Cir. 2005).

it was "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

By instructing the jury to consider the evidence of Mr. Bolin's previous offense for propensity purposes, the trial court failed to guard against the fundamentally unfair possibility that, in this wholly circumstantial case, "[a] jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man' without regard to his guilt of the crime currently charged." *Spencer*, 385 U.S. at 575 (Warren, C.J., concurring in part and dissenting in part). Faced with the State's concession of error—an error with pervasive and unquantifiable impact on the trial—the Nevada Supreme Court's terse harmlessness review was inappropriate and indefensible.

If AEDPA were deemed to apply to this claim,[16] habeas review by the federal courts likely would be foreclosed for Mr. Bolin for all time, because this Court has not yet decided the issue. *See Alberni*, 458 F.3d 860, 866-67; 28 U.S.C. § 2254(d)(1). This Court should grant review to address the standard of review and to secure uniform treatment of the issue on direct and federal habeas review.

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[16] Mr. Bolin does not concede that application of AEDPA is appropriate in any future federal habeas case, but anticipates such an argument by the State.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 19, 2007

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Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

GREGORY D. BOLIN,

Petitioner,

v.

E.K. MCDANIEL, WARDEN OF ELY STATE PRISON

THE STATE OF NEVADA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY BOLIN, Appellant, vs. THE STATE OF NEVADA Respondent.	No. 45383

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On October 2, 1996, the district court convicted appellant Gregory Bolin, pursuant to a jury verdict, of first-degree kidnapping, sexual assault, and first-degree murder. The jury returned a verdict of death for the murder. This court affirmed the judgment of conviction and sentence of death.[1] The United States Supreme Court denied Bolin's petition for a writ of certiorari on March 1, 1999. Bolin subsequently filed the instant petition, which the district court denied on July 11, 2005, without conducting an evidentiary hearing. This appeal followed.

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[1] Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998), abrogated in part by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002); see also Ledbetter v. State, 122 Nev. 252, 129 P.3d 671 (2006).

APPENDIX A

First, Bolin claims the district court erred by denying his claim that be was entitled to a new trial based on the erroneous admission of evidence of his prior Colorado conviction for kidnapping and sexual assault. The district court ruled that this evidence was proper to show identity and sexual aberration and for other purposes. The district court instructed the jury that it could consider the evidence in deciding whether Bolin possessed a propensity for sexual aberration. Bolin argued in his direct appeal that the evidence was improperly admitted. We held that the evidence was properly admitted to show identity;[2] consequently, we declined to consider whether the evidence was improperly admitted for any other purpose, including to show a propensity for sexual aberration.[3]

The State argues that this claim is barred by the law of the case doctrine.[4] We disagree. In Bolin's direct appeal, we expressly declined to consider whether evidence of the prior bad act was improperly admitted to show sexual aberration. Thus, the claim is not barred by the law of the case. The claim was not waived because Bolin raised it in his direct appeal, and his petition is not successive, so the procedural bars of NRS 34.810 are not at issue. Bolin argues that our decisions in Braunstein v. State[5] and Richmond v. State,[6] which were both decided after

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[2] Id. at 520-21, 960 P.2d at 795-96.

[3] Id. at 521 n.5, 960 P.2d at 796 n.5.

[4] See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001); Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

[5] 118 Nev. 68, 40 P.3d 413 (2002).

[6] 118 Nev. 924, 59 P.3d 1249 (2002).

APPENDIX A

Ms conviction became final, entitle him to relief on this claim.

The State argues that Bolin is not entitled to application of Braunstein and Richmond because his conviction was final when those cases were decided and they do not demand retroactive application on collateral review.[7] We need not reach this issue here because even if those cases were applied retroactively to Bolin, they would not entitle him to relief. Braunstein would not have barred admission of the prior bad act evidence; the evidence would still have been admissible to show identity, which we have already ruled was proper. And while Richmond would have rendered the sexual-aberration jury instruction improper, we conclude the error in giving the instruction would have been harmless in light of the weight of the evidence supporting Bolin's conviction. That evidence included Bolin's history of frequenting the victim's place of work and asking the victim and her sisters out on dates; surveillance videotape placing Bolin at the victim's place of work minutes before she arrived and approximately two hours before she departed on the night of her death; a witness who saw Bolin drive away from the crime scene in the victim's truck just before the witness discovered the dying victim; the victim's truck being found five blocks from Bolin's home with a bloody screwdriver inside; and evidence that Bolin was included among the one in every 2,400-2,600 African-Americans who could have been the donor of DNA evidence found on the victim's body. Thus, we

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[7] See generally Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002).

conclude the district court did not err in denying this claim.

Bolin also claims his trial and appellate counsel were ineffective with regard to the prior bad act evidence and sexual aberration jury instruction. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[8] "To establish prejudice based on the deficient assistance of appellate counsel; the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[9] We conclude the district court did not err in ruling that counsel were not ineffective. Trial counsel filed a pre-trial motion to exclude prior bad acts, and appellate counsel raised this issue on direct appeal. Neither counsel was deficient for failing to cite Braunstein and Richmond when those cases had not yet been decided.

Second, Bolin claims the district court erred by denying his claim that the DNA evidence should have been excluded as inconclusive and therefore irrelevant; Bolin also claims that the State's evidence and argument about the related statistical probabilities should have been excluded as a result. We concluded in Bolin's direct appeal that the DNA

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[8] See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[9] Kisksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

evidence and related statistics were proper. That ruling is now the law of the case.[10] The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument made after reflection upon the prior proceedings.[11] Accordingly, we conclude the district court did not err in denying this claim.

Bolin also argues that his counsel were ineffective for failing to challenge the DNA and statistical probability evidence by arguing that its inconclusiveness rendered it irrelevant. Bolin failed to establish that counsel's performance was deficient or prejudiced him. The State's expert witness testified that she found DNA evidence on the root and shaft of a foreign pubic hair recovered from the victim's body. She testified that a hair root would contain DNA, while the shaft would not, and thus, the DNA on the shaft must have been deposited there. She further testified that the DNA profiles she obtained from the root and the shaft were the same, but she could not determine whether the DNA on the shaft had been deposited there by the root, had come from somewhere else on the donor, or came from an entirely different donor with the same profile. She also testified that 1 in approximately 2,600 African-American males, including Bolin, would fit that profile. Her testimony that she could not draw a conclusion on how the DNA got on the shaft of the hair did not render the whole of the DNA evidence inconclusive or irrelevant. The jury was capable of assessing the proper weight to give this evidence. We

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[10] See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

[11] Hall, 91 Nev. at 316, 535 P.2d at 799.

note that trial counsel called its own DNA expert to testify as well. Thus, we conclude the district court did not err in denying this claim.

Third, Bolin contends the district court erred in denying his claim that the State violated Brady v. Maryland[12] by failing to disclose a second, lighter pubic hair recovered from the victim's body and by failing to preserve the first, darker pubic hair, which was tested, for independent analysis by the defense. Bolin also argues his counsel were ineffective for failing to investigate this issue during trial and for failing to raise this argument on direct appeal.

To the extent Bolin raises this claim as a direct appeal claim, it was waived by his failure to raise it on direct appeal.[13] As an ineffective assistance of counsel claim, Bolin failed to establish that counsel's performance was ineffective. Brady and its progeny require a prosecutor to disclose exculpatory evidence that is material to the defense.[14] A claim that the State committed a Brady violation must show that: the evidence at issue was favorable to the accused; the State failed to disclose the evidence, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.[15] Here, the State disclosed the existence of the lighter hair though it did not preserve it. It also disclosed the darker hair though it consumed the hair's root in testing it. Bolin does not allege that the State acted in bad faith, and

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[12] 373 U.S. 83 (1963).

[13] See NRS 34.810(1)(b)(2).

[14] See Strickler v. Greene, 527 U.S. 263, 280 (1999).

[15] Id. at 281-82.

he merely speculates that either hair might have exculpated him. Such speculation is not sufficient to support a Brady claim or a claim of improper loss of evidence or to demonstrate counsel's deficiency or prejudice, and we conclude the district court did not err in denying this claim,

Fourth, Bolin contends that the district court erred in denying his claim that a witness identified him after an unduly suggestive show-up procedure and that the show-up tainted the witness's subsequent in-court identification of Bolin; thus, Bolin argues, both identifications should have been excluded, at trial. In Bolin's direct appeal, we concluded that the show-up procedure was not improper. This ruling is now the law of the case and will not be revisited.[16] Bolin also argues that the district court erred in denying his claim that this court misapprehended the facts relating to this claim in his direct appeal. This claim was not properly brought in a postconviction petition for a writ of habeas corpus. We note that after this court decided his direct appeal, Bolin unsuccessfully sought rehearing.[17] Bolin also argues his counsel were ineffective for failing to challenge the identifications. As we have already ruled that the show-up procedure was not improper, Bolin failed to demonstrate that counsel's performance prejudiced him. Bolin further argues that trial counsel were ineffective for failing to object to testimony by the witness who observed him at the crime scene that he recognized Bolin's face, even though the witness had

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[16] See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

[17] Bolin v. State, Docket No. 29497 (Order Denying Rehearing, August 27, 1998).

also testified that he did not see Bolin's face. We conclude counsel was not ineffective. Our review of the record indicates that the witness testified that at the crime scene he saw Bolin's face in profile but not straight-on. The State questioned the witness about these facts, and the jury was capable of assessing the witness's credibility and weighing his identification of Bolin. Thus, the district court did not err in denying these claims.

Fifth, Bolin contends the district court erred in denying his claim that the search warrant was invalid because the affidavit supporting it contained material misrepresentations of fact and did not establish probable cause. Bolin also argues the State violated his constitutional rights by conducting a second blood thaw from Bolin without obtaining a second search warrant after realizing it had used the wrong serology kit in the first blood draw. In Bolin's direct appeal, this court ruled that the affidavit provided a substantial basis for finding probable cause and that the second blood draw was not improper. This ruling is now the law of the case and will not be revisited.[18] The law of the case doctrine cannot be avoided by a more detailed and precisely focused argument made after reflection on the prior proceedings.[19] Bolin also argues his trial counsel were ineffective for failing to adequately challenge the warrant and searches. As we have already ruled that the warrant and searches were not improper, Bolin failed to demonstrate that counsel's performance prejudiced him. Thus, the district court did not err in denying these claims.

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[18] See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

[19] Hall, 91 Nev. at 816, 535 P.2d at 799.

APPENDIX A

Sixth, Bolin claims his trial counsel were ineffective at sentencing for failing to call his family members and friends to testify in mitigation that they loved Bolin and would suffer as a result of the imposition of the death penalty, that Bolin was committed to his education, and that he had a relationship with his son. Bolin did not raise this argument below and alleges no cause for his failure to do so. Further, in light of the facts of this case, Bolin failed to establish that counsel's performance prejudiced him. Accordingly, the district court did not err in denying this claim.

Finally, Bolin argues that' the district court erred by denying his petition without conducting an evidentiary hearing. We disagree. Bolin failed to state any facts that, if true, would entitle him to relief.[20]

ORDER the judgment of the district court AFFIRMED.

_____, J.	_____, J
Gibbons	Hardesty
_____, J.	_____, J
Parraguire	Douglas
_____, J.	
Cherry	

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[20] See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

APPENDIX A

cc: Eighth Judicial District Court, Dept. No. 18
Munger, Tolles & Olson LLP
JoNell Thomas
Attorney General Catherine Cortez
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APPENDIX B

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. GREGORY D. BOLIN, #1218913 Defendant.	CASE NO: C130899 Dept No: XVIII

AMENDED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE having come on for hearing before the Honorable NANCY M. SAITTA, District Judge, on the 11th day of May, 2005, and the 27th day of July, 2005, the Petitioner not being present, represented by MELINDA EADES, ESQ., the

APPENDIX B

Respondent being represented by DAVID ROGER, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This case began on July 18, 1995, when the defendant was arrested and, subsequently, he was tried in the district court, found guilty of first degree kidnapping, sexual assault and murder in the first degree. That took place on or about July 15th of 1996.

2. Thereafter, the penalty phase was convened and the jury found that the aggravating circumstances in this case outweighed the mitigating circumstances and they sentenced the defendant to death.

3. Thereafter, a series of post-conviction matters arose, including a direct appeal to the Supreme Court that by written order affirmed or upheld the conviction and the sentence of death. Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998).

4. The defendant then filed a petition for writ of certiorari to the United States Supreme Court. On March 1st of 1999 that petition was denied. Bolin v. Nevada, 525 U.S. 1179, 119 S.Ct. 1117 (1999).

5. Finally, on April 22, 1999, the defendant filed a petition for writ of habeas corpus dealing with post-conviction. There was an amended writ filed in May of 2000, a supplemental petition for the writ on

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March 3, 2003, and the corrected supplemental petition that was filed on March 26th of 2003.

6. The facts of the underlying crime are adequately reported in the written decisions rendered by higher courts in this case.

CONCLUSIONS OF LAW

1. Based upon Colwell v. State, 118 Nev. Adv. Op. 80, 59 P.3d 463 (2002) and Richmond v. State, 118 Nev. Adv. Op. 94, 59 P.3d 1249 (2002), this court finds that Braunstein v. State, 118 Nev. Adv. Op. 8, 40 P.3d 413 (2002) announced a new rule of law relative to the admission of evidence of sexual aberration at a time when Bolin's case was already final on appeal and his writ of certiorari had been denied. New rules of law are generally not applied retroactively and this court finds that retroactive application of Braunstein is inappropriate in this case.

2. Issues two and ten of the petition concern alleged errors by the Nevada Supreme Court on appeal. This court does not have the authority to overrule the Nevada Supreme Court and moreover, decisions made by the Nevada Supreme Court constitute law of the case and can not be re-litigated in these proceedings. Hence, grounds two and ten are denied as without a legally cognizable basis in law.

3. In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). Under this test, the defendant must show first that his counsel's representation fell below

an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." United States v. Aguirre, 912 F.2d 555, 560 (2d Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

4. Having reviewed both the allegations of error constituting ineffective assistance of counsel at the trial level, as well as the appellate level, this court finds that a number of the suggestions of error are tactical decisions made by trial, as well as appellate counsel. Strategy and tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances. Doleman v. State, 112 Nev. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

5. In regards to challenging the forensic evidence in this case, namely two hairs that were at issue, this court finds that there was significant testimony and appropriate challenges in cross-examination of both the State's witnesses, as well as defense experts that were available here at the time of trial and that there is no error that can be assigned for ineffective assistance of counsel with respect to the forensic evidence.

6. In regards to challenging the bad act evidence consisting of defendant's 1975 convictions for rape and kidnapping, the record in this case clearly reflects that a Petrocelli hearing was held. Furthermore, trial counsel filed a pre-trial motion to

exclude the bad acts and submitted a jury instruction to the court which would have eliminated the sexual aberration language. This court finds no evidence of ineffective assistance of counsel in the challenging of the bad act evidence.

7. The trial court carefully weighed and determined in its own mind whether or not the criteria of Petrocelli had been met. The trial court properly found that the defendant's bad act was relevant to the crime charged, that it had been proved by clear and convincing evidence, and that its probative value was not substantially outweighed by danger of unfair prejudice. The prior bad acts were admissible pursuant to NRS 48.045(2) and this issue was dealt with substantially on appeal and becomes law of the case.

8. With respect to ineffective assistance of counsel relating to the alleged failure of trial counsel to object to the eyewitness identification, this court finds that there was no error in that identification and again, would note that this matter had been raised on a direct appeal to the Nevada Supreme Court and becomes law of the case. There has been no showing of ineffective assistance of counsel with respect to the cross-examination of the eyewitness and the challenging of the show-up identification.

9. In regards to the issues relating to DNA statistical probability, this was raised on direct appeal, but moreover, this court finds that there was both State and defense experts that testified with respect to that statistical analysis and that the reliability of the comparison, the type of test, as well as the trial process which the defendant's counsel went through at the time of trial was not in any way

violative of constitutional rights, that it is not in any way to be considered as a performance that was ineffective in any way.

10. In regards to the issues relating to the search warrant and the taking of samples from defendant on two occasions, this court finds the issue to be without merit. Trial counsel filed two separate motions that challenged the sufficiency and validity of the search warrant and, not only did the district court hear oral arguments and make decisions on those motions, but this was an issue that was raised again before the Supreme Court on appeal and becomes law of the case.

11. This court finds that there was no error in the manner in which trial counsel presented or argued defendant's alibi defense dealing with the two individuals that the defendant claimed he was with on the night of the murder. This issue is without merit.

12. This court does not find based upon Strickland. based upon Braunstein or based upon any of the related law that the arguments raised by the petition would give rise to the suggesting that there be reversal of defendant's conviction and the sentence. The hair analysis and DNA testimony was only a small part of what appeared to be rather substantial other evidence that the jury certainly may have been able to have come to their decision on even with or without the DNA error alleged. None of the alleged errors would have made a difference in the outcome of this case. Because defendant has failed to assert claims supported by specific factual allegations not belied by the record, that if true, would entitle him to relief, no evidentiary hearing is warranted.

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13. Finally, this court finds the individual suggestions of error and/or instances of ineffective assistance of counsel taken together still do not rise to the level of cumulative error. The evidence against defendant was significant and any errors were not so substantial that reversal is in order. This court is not inclined to find cumulative error especially where a majority of these issues have been raised and decided by the Supreme Court and were denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction Relief) shall be, and it is, hereby denied.

DATED this 27 day of July, 2005.

_____
DISTRICT JUDGE

DAVID ROGER

DISTRICT ATTORNEY
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #04352

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(4)

No. 07-688

FILED
JAN 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY D. BOLIN, *Petitioner,*

v.

E.K. McDANIEL, WARDEN OF ELY STATE PRISON

THE STATE OF NEVADA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether admission of prior bad act evidence under state law to show an emotional propensity for sexual aberration in a sexual assault trial violates federal due process when such evidence was also properly admitted for other purposes such as identity?

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No. 07-688

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY D. BOLIN, *Petitioner,*

v.

E.K. McDANIEL, WARDEN OF ELY SATE PRISON

THE STATE OF NEVADA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1996, Gregory Bolin was charged and convicted following a jury trial of first degree kidnapping, sexual assault and first degree murder of Brooklyn Ricks. Upon the jury's finding of several aggravating circumstances at a penalty hearing, Bolin was sentenced to death for the murder charge.

Petitioner raises the current issue concerning bad act evidence in the context of a request for certiorari review of the Nevada Supreme Court's Order filed June 22, 2007, affirming the trial court's denial of post-conviction relief. Petitioner's Appendix A. Previously, on direct appeal the Nevada Supreme Court held that because the bad act evidence was properly admitted to show identity, it was unnecessary to consider whether the evidence was improperly admitted to show a propensity for sexual aberration. Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998) *cert. denied*, Bolin v. Nevada, 525 U.S. 1179, 119 S.Ct. 1117 (1999) (No. 98-7042).

Upon Nevada's subsequent disavowal of the sexual aberration exception in 2002, Bolin again raised the issue in state post-conviction proceedings due to the intervening change in state law and on grounds of ineffective assistance of counsel. In affirming denial of post-conviction relief, the Nevada Supreme Court held that even if the change in state law were retroactively applicable to Bolin's case, the evidence would have still been admissible to show identity and

any error was harmless in light of the weight of evidence supporting Bolin's conviction. See Petitioner's Appendix at p. 3a.

STATEMENT OF FACTS

A. The Kidnapping, Sexual Assault, and Murder of Brooklyn Ricks

In July of 1995, Brooklyn Ricks and her husband Kerry, were living with Brooklyn's sisters, Liberty Wilson and Brittaney Lewis. Brooklyn, Liberty and Brittaney all worked at the B & R Video Store which was located in a strip mall occupied by various small businesses and an Albertson's supermarket.

On July 14, 1995, Brooklyn agreed to work an extra two hour shift for her sister, Liberty. At 9:45 p.m. Brooklyn left her home in a 1974 gray-spotted Chevy half-ton pick-up truck and drove to work. Brooklyn arrived at the video store at approximately 9:55 p.m., wearing a turquoise B & R Video pullover shirt with a polo shirt underneath, light blue jeans and white canvas shoes. Brooklyn was carrying a small

black backpack and was wearing her wedding ring, an opal ring, and a gold bracelet.

Five minutes prior to Brooklyn's arrival, the Defendant entered the store. The Defendant was a large, African-American male with a muscular build, likened to that of a bodybuilder. On this evening the Defendant was wearing a tight black tank top, tan shorts, and white tennis shoes. Liberty testified that the Defendant frequented the video store, and often engaged in conversation with the female employees. The Defendant had a particular interest in Liberty and had constantly asked her out on dates, although Liberty always declined.

At 10:00 p.m., Liberty finished her shift and walked out of the video store, followed by the Defendant. Liberty's car was parked directly in front of the store which was well illuminated by the lights of the video store. As Liberty quickly got into her car, she watched the Defendant walk on towards the Albertson's supermarket. At approximately 12:10 a.m. Brooklyn and co-worker Tabitha Wharton closed the video store for the evening. Brooklyn got into her

gray spotted pick-up truck and was last seen driving through the parking lot in front of the Albertson's supermarket.

Between 5:30 a.m. and 6:00 a.m., Keith Sirevaag, a framing foreman with Maverick Construction, arrived at the Windgate construction site. As Mr. Sirevaag drove towards the site he passed a parked gray spotted Chevy pick-up truck. Before Mr. Sirevaag exited his truck he watched an African-American male, approximately six feet tall, 220 to 230 pounds, with a muscular build, exit from the staircase area of one of the houses under construction. The man was wearing a dark tank top, tan dress shorts, and had a tattoo on his upper right bicep. The man walked within approximately twenty feet of Mr. Sirevaag, got into the gray pick-up truck, and drove off.

Upon exiting his vehicle, Mr. Sirevaag heard noises coming from the house that the African-American male had just exited. Mr. Sirevaag approached the staircase of the house and found a woman, her face covered in blood, and her body bound and gagged. Mr. Sirevaag believed the woman was

still alive and he attempted to get medical help. The woman, later identified as Brooklyn Ricks, died before medical personnel arrived.

Brooklyn Ricks was found wearing a ring and a bracelet, however her wedding ring and black backpack were never located. A sexual assault kit was performed on Brooklyn, who was found wearing her underwear inside out. A trace amount of semen (semen protein P30) was discovered in the vaginal swabs taken from Brooklyn. A used panty liner was located at the crime scene (Brooklyn was menstruating at the time of her demise), and a foreign hair was found in the pubic combing taken from Brooklyn's body.

Dr. Jordan, an assistant medical examiner with the Clark County Coroner's office performed the autopsy on Brooklyn Ricks. He testified that the victim had suffered multiple blunt traumas to the head, neck, and extremities. In addition, there were twelve rather unusual traumas present on the left chest and on the back. According to Dr. Jordan, these wounds could have been made with a screwdriver. Dr. Jordan concluded that Brooklyn Ricks died of a stab wound

to the chest, which penetrated the left lung, and blunt trauma to the head which caused subarachnoid hemorrhage.

Based on information obtained from Liberty Wilson and the video surveillance tape at the B & R Video Store, detectives for the Las Vegas Metropolitan Police Department contacted the Defendant at his home. The Defendant told the detectives that the previous night he had been wearing a white, round-necked t-shirt and sandals. Defendant also told the detectives that the previous night he stopped at the B & R Video Store and left the store around 10:00 p.m. The Defendant then walked to the Albertson's supermarket, bought a beer and donuts, walked around, and eventually returned to the parking lot at the Albertson's supermarket. The Defendant further claimed that he had spent the night at a party with "Robert" and "Ronny." Detectives were never able to corroborate this story. Defendant's father testified that his son left his home, where the Defendant was living, at approximately 9:00 p.m. to 10:00 p.m. on the night of July 14, and returned home at approximately 4:45 a.m. or 5:00 a.m. on the morning of July 15.

On July 16, 1995, a search warrant was served on the Bolin home and detectives retrieved a black tank top, tan shorts, and several pairs of shoes. After the search the Defendant was transported to the Clark County Detention Center where he was photographed, fingerprinted, and a serology kit was collected. The Rick's gray spotted Chevy pick-up truck was located four to five blocks from the Defendant's home with a bloody screwdriver inside. A foreign pubic hair recovered from Ricks' body was microscopically similar to a pubic hair strand obtained from Bolin. Additionally, one out of every 2600 African-Americans would have hair root DNA similar to both the DNA found in Bolin's hair and the DNA found in the foreign pubic hair found on Ricks' body. The Defendant was arrested on July 18, 1995.

B. The Kidnapping and Sexual Assault of Renee Morriss

On April 15, 1975, Renee Morriss (hereinafter "Morriss") and her then-husband John, were both Army nurses stationed in Aurora, Colorado. After finishing their shift at approximately 11:00 p.m., the

couple drove home together and exited their car at the parking spot in front of their apartment. Two young males came out of the bushes, one holding a .22 handgun, and told them to get back into the car. The older-looking male, who was approximately nineteen years old and who was later identified as Bolin, ordered John to drive or he would shoot Morriss. Immediately upon driving off, Bolin demanded money from the couple. While they did not have any cash in their possession, John gave Bolin his wallet and watch, and Morriss handed over her wedding ring. After driving approximately thirty minutes, Bolin forced John to stop the car in a dark and secluded area and then forced him into the trunk of the car at gunpoint.

During the next six hours, Bolin and his accomplice brutally raped Morriss on several occasions at gunpoint. Additionally, at one point in the evening, Bolin forced Morriss to drive to her apartment so that Bolin and his accomplice could rob her and John of their valuables. Morriss and John were eventually able to escape when Bolin forced her to drive to a convenience store and cash a check for one hundred

dollars. While Bolin and his accomplice were occupied in the store, Morriss ran back to her vehicle, drove off, and contacted the police. Bolin was eventually apprehended and pleaded guilty to two counts of first degree kidnapping and two counts of rape. Bolin spent the next thirteen years in a Colorado prison before being paroled in July 1988. In February 1990, Bolin's parole was revoked, and he consequently went back to prison for an additional five years. Bolin was finally released from the Colorado prison system on June 29, 1995, approximately two weeks prior to Ricks' murder.

Prior to trial in the present case, the State filed a motion to admit evidence of other crimes, wrongs or acts that Bolin committed against Renee Morris to show intent, motive, identity, and sexual aberration. Following an evidentiary hearing, the trial judge found clear and convincing evidence that the prior bad acts did occur and that the probative value outweighed any prejudicial effect. Such evidence was then admitted at the trial in 1996 as other bad act evidence for several purposes including a specific emotional propensity for sexual aberration.

ARGUMENT

HARMLESS ERROR ANALYSIS APPLIES TO ERRORS IN ADMISSION OF PRIOR BAD ACT EVIDENCE

Petitioner urges granting of the petition in this case in order to correct an allegedly fundamental error routinely committed by lower courts to subject constitutional errors based on prior bad act evidence to a harmless error analysis. See Petition at p. 12-13. While acknowledging the lower courts are unanimous in application of a harmless error analysis, Petitioner argues such a practice is contrary to this Court's precedents in Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993) and Neder v. United States, 527 U.S. 1, 11-13 (1999). However, neither Sullivan nor Neder concerned errors in the admission of prior bad act evidence. Sullivan held that the giving of a constitutionally deficient reasonable doubt instruction was not amenable to harmless error analysis because there had been no jury verdict within the meaning of the Sixth Amendment. Sullivan, supra. Neder, on the

other hand, held that a harmless error analysis ***does*** apply to an erroneous jury instruction that omits an element of the offense. Neder, supra. These cases are inapposite to errors in the admission of prior bad act evidence for propensity purposes.

Admittedly, this Court has recognized a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." Arizona v. Fulminate, 499 U.S. 279, 309, 111 S.Ct. 1246 (1991). Errors of this type are so intrinsically harmful as to require automatic reversal (ie., "affect substantial rights") without regard to their effect on the outcome. Id. Such errors have included a complete denial of counsel, a biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, and defective reasonable doubt instruction. See Neder, supra. However, an error in the admission of prior bad act evidence is not of such magnitude that it produces a fundamentally unfair criminal trial requiring automatic reversal. Where the prior bad act evidence is relevant to particular issues in the case other than just propensity and the probative

value is not outweighed by the risk of unfair prejudice, a harmless error analysis is available.

ADMISSION OF PROPENSITY EVIDENCE IS NOT UNCONSTITUTIONAL

This Court has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith. Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991). Notably in Estelle, this Court held that the admission of the evidence did not rise to the level of a due process violation because "the prior injury evidence was relevant to an issue in the case" - - "[b]ecause we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." Id. at 75 n. 5, 112 S.Ct. 475.

Recently, the Ninth Circuit in Alberni held that a state court's determination that due process was not violated by the introduction of propensity evidence was not objectively unreasonable. Alberni v. McDaniel, 458 F.3d 860 (9th Cir. 2006). Although the

admissibility of evidence is generally a matter of state law, the Alberni Court recognized that the admission of prior bad act evidence for propensity purposes may violate federal due process if it renders a trial fundamentally unfair. However, under the facts of the particular case the lower state court's conclusion that the propensity evidence did not violate due process was not an unreasonable conclusion.

In 1995, the Federal Rules of Evidence were amended to enlarge the admissibility of prior bad act evidence in sexual assault and child molestation cases including for purposes of showing propensity:

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Fed.R.Evid. Rule 413.

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

Fed.R.Evid. Rule 414.

The Tenth Circuit rejected a due process challenge to Rule 413 because propensity evidence still can be excluded whenever its prejudicial effect substantially outweighs its probative value. United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 202 (U.S. 1998). Assuming the prior offenses are relevant, Rule 413 allowing admission of evidence of similar crimes in sexual assault cases supersedes Rule 404's prohibition against admission of character evidence. United States v. Crawford, 413 F.3d 873 (8th Cir. 2005). Likewise, in child molestation cases, admission of prior bad acts for purposes of demonstrating character under Rule 414 does not violate a due process right to a fundamentally fair trial when such evidence is relevant but not overly prejudicial. United States v. Castillo, 140 F.3d 874 (10th Cir. 1998). The test under which the probative value of evidence is balanced against its prejudicial effect ensures that evidence which might jeopardize the right to a fair trial will be excluded. Id.; see also United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001).

THE PRIOR BAD ACT EVIDENCE WAS RELEVANT FOR PURPOSES OTHER THAN PROPENSITY

As in Estelle v. McGuire, supra, the prior bad act evidence used against Bolin was relevant to issues other than just propensity for a sexual aberration. The trial judge first noted many similarities between the sexual assault of Renee Morriss and that of Brooklyn Ricks:

> There is a very similar time frame near midnight to 3, 4:00 in the morning. There is evidence in both cases of an abduction utilizing the victim's own vehicle. Both involved brutal and forcible rapes. Both involved - - there is evidence to suggest that laying await was the means by which the victims were accosted.
>
> The threats of death in the case involving Ms. Morriss do create a remarked similarity to this case. The difference in the instant prosecution is that the victim did not manage to escape.

8 ROA 55. The trial judge then ruled that the prior kidnapping and rape of Renee Morriss would be admissible, "particularly given the fact that there is a very vigorously litigated issue of ***identification*** in this

prosecution." Id. The judge also ruled the evidence was admissible to prove motive, intent, and knowledge. 8 ROA 56. In addition to limiting instructions contemporaneously given with the prior bad act testimony, Bolin's jury was formally instructed as follows:

> Evidence of a person's character or a trait of his character or evidence of other crimes, wrongs or acts, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.
>
> However, such evidence is admissible for other purposes, such as proof of motive, intent, knowledge, or identity, and as evidence that the person possesses a specific emotional propensity for sexual aberration.

5 ROA 1166 (Jury Instruction #21). With the exception of the last phrase concerning "a specific emotional propensity for sexual aberration," the instruction parallels NRS 48.045 as well as Rule 404 of the Federal Rules of Evidence.

The prosecutor argued to the jury that the Defendant's conduct in 1975 for sexually assaulting a woman at gunpoint in a remote location after locking her husband in the trunk of a car constituted aberrant

sexual behavior. 51 ROA 168-72. The prosecutor then argued that this aberrant sexual behavior was relevant to show the motive, intent, knowledge and ***identity*** of the perpetrator for the sexual assault in the instant case. Id. But at no time did the prosecutor ever argue or suggest that just because the Defendant had raped before, that he must have raped again. The prior sexual assault evidence was not simply used as character evidence to show conformity, but instead was properly admitted and argued to show motive, intent, knowledge and identity.

On direct appeal, the Nevada Supreme Court agreed with the trial judge that there were numerous similarities justifying admission of the prior bad act evidence to show ***identity***:

> An analysis of the similarities between these two crimes reveals a common ***identity***. In both, young white women of similar age, complexion, and build were abducted in their vehicles late at night, their wedding rings and other valuables taken, and their vehicles used to secret them to remote locations where they were subjected to brutal sexual assaults. Because of the similarities between the two crimes, we conclude that the district court did not err in admitting evidence of Bolin's prior rape and kidnapping convictions for the purpose of establishing ***identity*** pursuant to NRS 48.045(2).

Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). Notwithstanding the instruction regarding a "specific emotional propensity for sexual aberration," the prior bad act evidence was properly admitted and considered for non-propensity purposes, namely to show identity.

THE PROBATIVE VALUE OF THE PROPENSITY EVIDENCE OUTWEIGHED ANY UNFAIR PREJUDICE

In 1978, Nevada recognized "emotional propensity" as a narrow exception for the admission of prior bad act evidence in cases involving sexual aberration. McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1978) (Admission of prior and subsequent acts of oral copulation between defendant and 13-year old victim were properly admitted). The court reasoned that certain sex crimes were widely recognized as stemming from a "specific emotional propensity for sexual aberration":

> The fact that in the near past one has given way to unnatural prochivities has a direct bearing upon the ultimate issue whether in the case being tried he is guilty of a particular unnatural act of passion. The importance of establishing this fact far outweighs the prejudicial possibility that the jury might convict for general rather than specific criminality.

Id. The court agreed that such evidence was relevant to prove intent or the absence of mistake or accident which was put in issue by the not guilty plea. Id. The court further noted that such evidence was subject to exclusion if the prejudice outweighed the probative value and that the exception did not apply to "mere criminal propensities in general, but rather to specific sexual proclivities." Id.

That same year the exception was extended in a child lewdness case to prior sex acts with persons other than the current victim which had occurred several years earlier. Findley v. State, 94 Nev. 212, 577 P.2d 867 (1978). The challenged testimony was received with a limiting instruction to prove intent, or the absence of mistake or accident after balancing prejudice and probative value. Id. This was the Nevada law in effect in 1996 when Defendant's trial was held in the present case.

Not until 2002 did the Nevada Supreme Court repudiate the legal proposition stated in McMichael that evidence showing an accused possesses a propensity for sexual aberration is relevant to the

accused's intent. Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002). In so doing, the court affirmed that the prior acts of child molestation at issue in Braunstein were nonetheless properly admitted because the acts were established by clear and convincing evidence, were relevant to prove a common scheme or plan, and were not substantially outweighed by the danger of unfair prejudice. Id. The court in Braunstein saw the sexual aberration approach as a carry-over from common law that should not have survived adoption of the evidence code, specifically NRS 48.045(2), which reads as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NRS 48.045(2). The concern in Braunstein was that McMichael and Findley appeared to hold as a matter of law that prejudice is always outweighed by relevance whenever other act evidence of sexual aberration is considered for admission. The Braunstein

court affirmed that the only appropriate analysis for the admission of prior bad acts is within the parameters of NRS 48.045(2) and weighing of the probative value against the risk of unfair prejudice. Braunstein, supra.

When considering the retroactive effect of the Braunstein case, the Nevada Supreme Court held as follows:

> The new rule in Braunstein simply interprets NRS 48.045(2), an evidence statute concerning the admissibility of prior bad acts. ***This is clearly an issue of state law***, and does not derive from the United States Constitution.

Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002) [emphasis added]. The Richmond court also held that Braunstein announced a new rule that had no retroactive effect to cases which were already final on direct appeal. Id. Although the prior bad act evidence was improperly admitted in Richmond, a majority of the court agreed that motive could be a valid basis for admission of prior act evidence in child sex abuse prosecutions to show a defendant's attraction to or obsession with his victims.

> Evidence of separate acts of pedophilia or other forms of sexual aberration are not character evidence, but are admissible for the "other purpose" [under NRS 48.045(2)] of explaining why a crime of sexual deviance was committed. The mental aberration that leads a person to commit a sexual assault upon a minor child, while not providing a legal excuse to criminal liability, does explain why the event was perpetrated.

Id. at 939 n. 14, 59 P.3d at 1259 n. 14 (Maupin, J., concurring in part and dissenting in part). It therefore remains the law in Nevada that whatever might "motivate" one to commit a criminal act, including a sexual aberration, is legally admissible to prove motive under NRS 48.045(2) so long as the evidence is established by clear and convincing evidence and the probative value outweighs the risk of unfair prejudice. Ledbetter v. State, 122 Nev. 252, 129 P.3d 671 (2006).

In the present case, evidence of Bolin's prior kidnapping and rape of Renee Morriss was established in a pre-trial hearing by clear and convincing evidence. See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). The trial judge further ruled that the probative value of such evidence outweighed any prejudicial effect. Consistent with federal precedent discussed

above, due process is not a per se bar to propensity evidence. Where the evidence is relevant to issues other than propensity and the prejudicial effect is outweighed by the probative value, fundamental due process and the right to a fair trial are not effected.

ANY ERROR WOULD HAVE BEEN HARMLESS

The admission of the prior bad act evidence in this case, even for propensity purposes, was not a constitutional error. Contrary to Petitioner's claim, the Nevada Supreme Court has never held that Bolin's direct appeal was erroneously decided under the law in existence at the time. Rather, in Braunstein, supra, it departed from the precedent relied on in Bolin's direct appeal and then in Richmond, supra, held that Braunstein's change in law was not retroactive. A change in law with no retroactive application does not render prior rulings erroneous.

In affirming denial of post-conviction relief, the Nevada Supreme Court held that even if the change in state law were retroactively applicable to Bolin's case, the evidence would have still been admissible to show identity and any error was harmless in light of the

weight of evidence supporting Bolin's conviction. See Petitioner's Appendix at p. 3a. Thus, even if Bolin were correct that harmless error analysis should not apply to the admission of propensity evidence, Bolin would still have to show that the propensity evidence was erroneously admitted and that he is entitled to retroactive application of the change in state law.

In his Petition, Bolin repeatedly emphasizes the circumstantial nature of the evidence against him and suggests the evidence was weak. This is contrary to the findings of the court below. In holding that any error would have been harmless, the Nevada Supreme Court considered the weight of the evidence supporting Bolin's conviction:

> That evidence included Bolin's history of frequenting the victim's place of work and asking the victim and her sisters out on dates; surveillance videotape placing Bolin at the victim's place of work minutes before she arrived and approximately two hours before she departed on the night of her death; a witness who saw Bolin drive away from the crime scene in the victim's truck just before the witness discovered the dying victim; the victim's truck being found five blocks from Bolin's home with a bloody screwdriver inside; and evidence that Bolin was included among the one in every 2,400-2,600 African-Americans who could have been the donor of DNA evidence found on the victim's body.

See Petitioner's Appendix at p. 3a. Considering the weight of this evidence, it is clear beyond a reasonable doubt that the jury would have found Bolin guilty absent the prior bad act evidence. The evidence was properly admitted for purposes of identity and its probative value outweighed any unfair prejudice. Thus, any error in the jury considering the bad act evidence for propensity purposes would have been harmless.

CONCLUSION

Federal law does not prohibit the consideration of propensity evidence when also relevant to particular issues in the case such as identity. Safeguards such as the weighing of probative value against the risk of unfair prejudice and establishment of the prior bad acts by clear and convincing evidence adequately protect constitutional due process rights. Nevada's departure from the sexual aberration precedent is purely a matter of state law and is not retroactive to Bolin's case.

Nevada's harmless error analysis did not concede error in the admission of propensity evidence in Bolin's case, but simply concluded that if the change in law did apply any error would have been harmless. Bolin has presented no federal issues here warranting certiorari relief by this Court.

DATED this 24th day of January, 2008.

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In the Supreme Court of the United States

GREGORY D. BOLIN,

Petitioner,

v.

E.K. MCDANIEL, WARDEN OF ELY STATE PRISON

THE STATE OF NEVADA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

The State fails to address the question presented or the reasons for review. The question is whether an erroneous instruction that invites the jury to base its conviction on propensity evidence violates due process, undermines the burden of proof and "vitiates *all* the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993). This issue has evaded and will continue to evade federal habeas review. While the federal Courts of Appeal are in agreement that such circumstances impinge on due process, this Court has left the question open, *Estelle v. McGuire*, 502 U.S. 62, 74 n.5 (1991), and the state courts are therefore free to ignore this constitutional requirement. *See* 28 U.S.C. § 2254(d)(1)(restricting body of law on federal habeas review to the decisions of this Court). This Court should grant review and resolve this issue dividing state and federal courts once and for all.

ARGUMENT

I. THE STATE DOES NOT ADDRESS THE REASONS THAT CERTIORARI SHOULD BE GRANTED.

Review is warranted here for two compelling reasons: First, state courts consistently fail to recognize that propensity errors raise due process concerns and require the structural error analysis set out in *Sullivan v. Louisiana*, 508 U.S. at 281-282, and *Neder v. United States*, 527 U.S. 1, 11-13 (1999). Second, unless this Court grants certiorari, these constitutional errors will remain insulated from federal habeas review. The State offers no response to either point.

A. Certiorari should be granted to resolve that an instruction inviting juries to convict based on a defendant's "propensity" to commit crimes is fundamental error.

The State argues the wrong question, urging that the *admissibility* of prior bad acts evidence is governed by state law and reviewed for harmless error. That is not the question presented. Mr. Bolin's petition does not challenge the *admission* of prior bad act evidence; it challenges the concededly erroneous *instruction* to the jury inviting a conviction based on propensity evidence. Whether that instruction is structural error under *Sullivan* and *Neder* is an open question that demands this Court's review.

The State responds that *Sullivan* and *Neder* do not concern "errors in the *admission* of prior bad act evidence." (Opp. at 6.) That is true. *Sullivan* and *Neder* address *instructional* error and are directly applicable to the question presented here: whether the conceded instructional error is ordinary trial error or fundamental structural error. As the Petition argued, under *Sullivan* and *Neder*, the erroneous instruction to consider prior bad acts as evidence of propensity "vitiates *all* the jury's findings." 508 U.S. at 281 (emphasis in original). In this circumstantial case, there is no "untainted" evidence to weigh the taint against, thus rendering harmless error analysis completely ineffectual: a "reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done." *Id.* The effect of the error itself is "unquantifiable," and thus not subject to harmless error review. *Id.* at 282.

B. Absent review, a recognized due process violation will continue to evade federal habeas review.

Mr. Bolin's case presents an ideal vehicle for resolving an important issue that otherwise is insulated from habeas review in the federal courts. Every federal circuit court to consider the issue has held that the erroneous instruction to consider propensity evidence implicates the federal due process guarantee.[1] Without this Court's intervention, however, state court errors relating to propensity evidence—no matter how unreasonable—are wholly unreviewable by the lower federal courts. *See Alberni*, 458 F.3d at 865-867 (applying AEDPA and holding that a federal court cannot reject a state court's decision on whether propensity evidence compromises due process because the question has been expressly left open by this Court).

Under AEDPA, federal courts may grant habeas relief only for violations of "clearly established

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[1] *See Alberni v. McDaniel*, 458 F.3d 860, 865-66 (9th Cir. 2006) (collecting cases and stating that "every circuit . . . has acknowledged, at least implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair."); *see also Dunnigan v. Keane*, 137 F.3d 117, 127 (2d Cir. 1998) (failure to give a limiting instruction could "constitute an error so egregious as to amount to a denial of due process"); *Albrecht v. Horn*, 485 F.3d 103, 128-129 (3d Cir. 2007) (admission of propensity evidence without a limiting instruction could violate due process if sufficiently "inflammatory"); *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993)(admission of irrelevant propensity evidence violated due process clause); *Duvall v. Reynolds*, 139 F.3d 768, 788 (10th Cir. 1998) (acknowledging that mistakenly admitted evidence of prior crimes or convictions can "imping[e] upon the fundamental fairness of the trial itself.")(internal quotations omitted).

Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (defining the applicable body of law as "the holdings, as opposed to the dicta, of this Court's decisions"). This Court's holdings need not be explicit to establish grounds for habeas relief; the lower federal courts may grant relief for a state court's unreasonable refusal to extend the general principles established in this Court's holdings to a new context. *Id.* at 407-408. But, because this Court in *Estelle* expressly reserved judgment on the issue, the federal courts routinely hold that AEDPA bars relief for the erroneous use of a prior conviction to establish "propensity," because the law is not "clearly established" by this Court.[2] This result transforms the pragmatic reservation of judgment in the *Estelle* footnote—written years before AEDPA was enacted—into a permanent and unintended jurisdictional bar.

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[2] *See, e.g., Paige v. Bradshaw*, No. 1:05-CV-2618, 2007 WL 4323785 (N.D. Ohio Apr. 4, 2007), at *11-12 (denying habeas relief in case involving decades old allegations of uncharged misconduct because "the Supreme Court [in *Estelle*] has left the issue open"); *Baker v. Lewis*, No. Civ. S-01-0804 LKK JFMP, 2007 WL 1040969 (E.D. Cal. Apr. 4, 2007), at *28 (denying petition for habeas relief on additional ground that "the Supreme Court has not expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes"); *Casey v. Brown*, No. C:04-4749 RJH (PR), 2007 WL 2209325 (N.D. Cal. July 30, 2007), at *10 ("Because . . . there is no clearly-established Supreme Court authority, habeas relief could not be granted even if the court were to hold that petitioner's due process rights were violated.")

The State does not address this ground for certiorari. Indeed, it has missed the issue entirely. In its Opposition, the State misreads *Alberni,* claiming that the court reached the merits of the due process issue and approved the admission of propensity evidence. (Opp. at 8.) That is not what *Alberni* held. Rather, the *Alberni* court held that it could not grant habeas relief under AEDPA because of the express reservation in the *Estelle* footnote—precisely the ground Mr. Bolin urges here to support certiorari. *See Alberni*, 458 F.3d at 866-67 (stating that it could not conclude that the Nevada Supreme Court acted unreasonably in light of *Estelle*, because "[t]he right Mr. Alberni asserts has not been clearly established by the Supreme Court, as required by AEDPA").

This Court should grant review to correct the erroneous application of harmless error review, and in the process acknowledge what the lower federal courts have already settled: the erroneous instruction to consider prior bad act evidence as propensity evidence runs afoul of due process guarantees. This issue should be resolved in this Court's jurisprudence, eliminating the injustice created by the intersection between the *Estelle* footnote and the AEDPA standard for relief.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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